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Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals

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NOTE

RESPECTING COMMITMENT: A PROPOSAL TO PREVENT LEGAL BARRIERS FROM OBSTRUCTING THE EFFECTUATION OF INTESTATE GOALS

Marissa J. Holob

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INTRODUCTION

The power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it, and that which tends most to the perpetuation of society itself.

—Edmund Burke¹

The structure of the American family has changed dramatically over the past several decades.² The traditional family, consisting of the bread-winning husband, the homemaking wife, and their two biological children, still exists but in ever decreasing numbers.³ The divorce rate has increased and many families now include stepchildren.⁴ In addition, more people, such as same-sex couples, are choosing alternative lifestyles, such as cohabiting with their partner in a nonmarital domestic partnership.⁵

¹ EDMUND BURKE, *Reflections on the Revolution in France*, in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 102 (Paul Langford ed., Clarendon Press 1989) (1791).

² See Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353 (1988) (noting that "[a] wide variety of other types of communal living arrangements are becoming more common"); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 685-87 (1992) (noting that "divorce rates are astonishingly high and remarriage abounds" and that "[l]esbian, gay, and unmarried heterosexual couples, sometimes with children, constitute unmistakable parts of the American family scene" (footnotes omitted)).

³ One study discovered that the husband is the sole breadwinner in only ten percent of American families. See D.C. COMM'N ON DOMESTIC PARTNERSHIP BENEFITS FOR D.C. GOV'T EMPLOYEES, 1 FINAL REPORT AND RECOMMENDATIONS 7 (1990).

⁴ See Waggoner, *supra* note 2, at 685-86.

⁵ See Lovas, *supra* note 2, at 353. Lovas writes:

The nontraditional family may consist of an unmarried couple, either homosexual or heterosexual, and either with or without the minor or adult children of one or both partners; a single parent, with minor or adult children; or a stepfamily, with the 'parents' either married or unmarried, with minor or adult children from the prior marriages or relationships of one or both of the 'parents,' and possibly with the joint children of the 'parents.'

Id. at 353 (footnotes omitted). The practice of cohabitation has become so commonplace that the Census Bureau "coined the acronym POSSLQ ('partners of opposite sex sharing living quarters') to describe this kind of living arrangement." Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497, 499 (1991).

A 1994 study found that domestic partnerships⁶ comprised about seven percent of couples in the United States.⁷ The study showed that approximately thirty percent of these domestic partnerships were lesbian or gay couples.⁸ With the increase in these relationships, significant changes have occurred in society's attitudes regarding cohabitation.⁹ Even though the law has to a limited extent recognized nonmarital relationships, "[p]referential treatment of the traditional family unit [still] pervades law and society . . . [,] discriminat[ing] against people who do not live in traditional family settings."¹⁰ Domestic partnership law is uncertain and often depends on the presiding judge or particular jurisdiction. Domestic partners lack many rights that are conferred upon married couples.¹¹ For example, domestic partners do not have the protection of divorce laws,¹² the ability to sue in tort for the loss of consortium,¹³ the right to make medical decisions for each other,¹⁴ or immunity under evidence laws.¹⁵ A last and, for the purposes of this Note, most important area

⁶ Defining domestic partnerships raises many political, practical, and moral questions. This Note will use the term to mean a couple, whether homosexual or heterosexual, who not only live together, but also share an emotional bond similar to that expected of married couples. The difficulties with defining domestic partnerships in determining whether the surviving partner of a decedent should inherit will be discussed later. See *infra* Part III.C. This Note will use the terms domestic partner, committed couples, and nonmarital couples interchangeably. All of these terms refer to a nontraditional, family-type, intimate relationship. See also LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 85 (1997) (defining domestic partners as those who are "sexually intimate and financially interdependent").

⁷ See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 3 (1998).

⁸ See *id.*

⁹ See WAGGONER ET AL., *supra* note 6, at 85 (noting half of the population under age forty has lived with an unmarried partner at some point in their lives); Andrew Herrmann, *Breaking Up Is Not Hard To Do*, CHI. SUN TIMES, Feb. 9, 1999, at 25 (noting that the number of unmarried couples living together increased from 439,000 in 1960 to 4.2 million in 1998).

¹⁰ Amy L. Brown, Note, *Broadening Anachronistic Notions of "Family" in Proxy Decision-making for Unmarried Adults*, 41 HASTINGS L.J. 1029, 1029 (1990).

¹¹ See David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 447 (1996) ("Laws that treat married persons in a different manner than they treat single persons permeate nearly every field of social regulation in this country—taxation, torts, evidence, social welfare, inheritance, adoption.").

¹² See Mary N. Cameli, *Extending Family Benefits to Gay Men and Lesbian Women*, 68 CHI.-KENT L. REV. 447, 448-49 (1992).

¹³ See *Elden v. Sheldon*, 46 Cal. 3d 267, 269 (1988).

¹⁴ See Brown, *supra* note 10, at 1036-37 (noting that no state "statutes suggest that a lover or close friend of the patient might . . . be a better proxy decisionmaker than a legal relative").

¹⁵ See WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 66 (1996). Eskridge includes a laundry list of rights enjoyed by married couples but denied to domestic partners. See *id.* at 66-67.

where domestic partners do not enjoy the same rights as married couples is in the realm of intestacy laws.¹⁶

Domestic partnerships are severely negatively affected by property laws that insufficiently protect their interests. Estate planning is an especially problematic area for nontraditional families.¹⁷ Many individuals, however, either fail to satisfactorily plan the disposition of their estates or make an invalid will.¹⁸ When individuals fail to plan "either in the entirety or in an effective manner—[it] triggers application of the laws of intestate succession."¹⁹ Laws in the United States are biased toward the traditional family²⁰ and thus "[u]nless . . . voluntary protections have been created, the survivor of . . . an unmarried couple, homosexual or heterosexual, stands completely without inheritance rights."²¹ This preference is unjust, and thus current intestate regulations conflict with the very policies they are supposed to advance.²² In addition, as more and more couples choose alternative family arrangements, current intestate succession laws adequately protect an increasingly smaller portion of society. Although significant changes have occurred in intestate succession laws, these changes do not satisfy all of the needs of domestic partners.

This Note argues that intestate succession laws should be extended to include domestic partners (unmarried but committed couples). Part I focuses on the Uniform Probate Code, discussing the history of intestacy laws and the policies behind modern intestacy statutes. Part II examines the rights of unmarried couples. Part III con-

¹⁶ Cf. Lovas, *supra* note 2, at 353 ("Although the traditional family is in the minority, the statutes governing inheritance . . . are generally patterned after the traditional family.").

¹⁷ See *id.* at 354 (discussing "special estate planning problems" of nontraditional families, including the appropriate distribution of property, the minimization of death taxes, custody battles of minors, medical care decisions, and funeral arrangements).

¹⁸ See Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 943-44 & n.14 (1995).

¹⁹ *Id.* at 941 (footnote omitted).

²⁰ See Thomas M. Hanson, Note, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257, 260 (1995) (noting that "the intestacy laws of most states are still structured as if the traditional family is the dominant social familial unit").

²¹ Lovas, *supra* note 2, at 363. In the current version of the Uniform Probate Code (UPC), only spouses, parents, and descendants can recover under intestacy laws. See UNIF. PROBATE CODE §§ 2-102, 2-103 (amended 1993), 8 U.L.A. 81-84 (1998). Currently, no UPC provisions grant a decedent's partner any intestacy rights. In Part IV.B, this Note will analyze Professor Robert Waggoner's proposal to revise the UPC to allow committed partners to receive a portion of their deceased partners' estates.

²² Cf. Brown, *supra* note 10, at 1029 ("Preferential treatment of the traditional family unit pervades law and society. Usually this deference is innocuous. In certain situations, however, it discriminates against people who do not live in traditional family settings, but who instead have formed other types of primary relationships."). This Note discusses how succession laws that ignore nontraditional families undermine their own underlying policies. See *infra* Part I.B, III.A.

siders the public policy considerations for extending inheritance rights to domestic partners. Part IV analyzes several different methods for granting an intestacy share to domestic partners.

I

INTESTACY LAWS

A. History and Development

"Man is mortal. But the things he owns do not disappear with him. Once mankind . . . passed the stage in which a man's belongings are destroyed or buried along with him at his death, the community must see to it that they are allotted to a new owner."²³ The development of individual ownership gave rise to the desire to dispose of property according to one's own wishes. Although documents resembling wills have been in existence for five thousand years, the modern American law of wills owes its origins to the Romans.²⁴ The Romans defined inheritance as "universal succession"²⁵ and believed that the inheritor did not simply represent the deceased but "continued his civil life, his legal existence."²⁶

After the Romans, "testamentary law continued under the auspices of the Church."²⁷ During this period, wills could be either written or oral.²⁸ In addition, will execution formalities did not exist, and thus problems with fraud were prevalent.²⁹ To solve these problems, the state instituted laws governing the inheritance of property.³⁰ This development is evident today in American probate laws, in which the "rights to intestate succession are almost wholly statutory."³¹

In the past, property distribution depended on the type of property owned, the deceased's social status, where the deceased lived, and the deceased's sex.³² The advent of feudalism brought about the pri-

²³ MAX RHEINSTEIN & MARY ANN GLENDON, *THE LAW OF DECEDENTS' ESTATES* 1 (1971).

²⁴ See generally ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 3 (1928) (discussing the existence of wills in ancient Egypt, as well as in Hebrew, Greek, and Roman law).

²⁵ Judith N. Cates & Marvin B. Sussman, *Family Systems and Inheritance*, in *FAMILY SYSTEMS AND INHERITANCE PATTERNS* 1, 2 (Judith N. Cates & Marvin B. Sussman eds., 1982) (discussing origins of Anglo-American inheritance law).

²⁶ *Id.*

²⁷ *Id.* at 3.

²⁸ See REPPY & TOMPKINS, *supra* note 24, at 8.

²⁹ See *id.* at 9.

³⁰ See *id.*

³¹ Hanson, *supra* note 20, at 262.

³² See generally REPPY & TOMPKINS, *supra* note 24, at 4-10 (tracing the law of wills and testaments in England from the time of the Norman Conquest to the enactment of the Wills Act of 1837).

mogeniture system of inheritances,³³ whereby all the land of wealthy individuals passed directly to the eldest son.³⁴ Personalty, however, could pass to a decedent's spouse, child, or another of the decedent's choosing by testamentary disposition.³⁵

In 1676, England passed the Statute of Frauds.³⁶ It included formalities for making wills and severely limited the use of oral wills.³⁷ Over a hundred years later, the Crown enacted the Statute of Wills (Wills Act),³⁸ allowing "every person to devise, bequeath or dispose of by will all descendible real or personal estate which he owned . . . at the time of death"³⁹ as long as the formalities of execution were followed. The Wills Act also set a minimum age requirement for testamentary capacity, outlined the proper revocation of wills under different circumstances (including marriage), and established requirements for codicils, alterations, republication, and many other contexts.⁴⁰

In most of the United States "the law of wills is of English origin, modified by statutes designed to meet local needs."⁴¹ Early British common law of inheritance, as already noted, created separate rules for land and personalty.⁴² In time, the British system evolved to allow testamentary disposition of both land and personalty.⁴³ In the United States, however, individuals have always had the power to dispose of both real and personal property as they saw fit.⁴⁴ In addition, while the British system historically focused on maintaining the social status and welfare of widows and dependent family members, the American system emphasized fulfilling a decedent's donative intent.⁴⁵

The historical variations between U.S. and British probate laws arose because conditions in the two countries were different.⁴⁶ With the development of a market economy in colonial America, feudal

³³ See CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 24 (1987).

³⁴ See *id.*

³⁵ See *id.*

³⁶ See REPPY & TOMPKINS, *supra* note 24, at 9.

³⁷ See *id.*

³⁸ See *id.* at 14-15.

³⁹ *Id.*

⁴⁰ See *id.* at 14-17.

⁴¹ *Id.* at 47; see also SHAMMAS ET AL., *supra* note 33, at 30-31 (discussing the influence of English probate laws on inheritance statutes in Colonial America).

⁴² See REPPY & TOMPKINS, *supra* note 24, at 47.

⁴³ See SHAMMAS ET AL., *supra* note 33, at 26-27.

⁴⁴ See REPPY & TOMPKINS, *supra* note 24, at 47 (noting that the United States has always recognized "the power to make testamentary disposition of both real and personal property").

⁴⁵ See *id.*; RHEINSTEIN & GLENDON, *supra* note 23, at 8.

⁴⁶ See REPPY & TOMPKINS, *supra* note 24, at 47.

principles were not applicable.⁴⁷ Because there was an abundance of unclaimed land throughout our nation's history, the United States did not attach as much importance to its ownership as the British did.⁴⁸ In addition, the preference for male descendants over female descendants in intestacy law began to erode in America during colonial times, long before it did in England.⁴⁹ This preference disappeared because it "was considered incompatible with that equality . . . which it is the constitutional policy of this country to preserve and inculcate."⁵⁰ With an abhorrence of "aristocracy [and] family dynasties,"⁵¹ American probate codes developed by focusing on "individual freedom of disposition."⁵²

B. Modern Intestacy Laws

In the absence of a valid will, probate codes control inheritance by dictating which family members receive what part of a decedent's estate.⁵³ In addition, most probate codes ensure that spouses receive a guaranteed minimum percentage of the decedent's estate, regardless of any testamentary instruments to the contrary.⁵⁴ While all state probate codes differ, most are based at least in part on the Uniform Probate Code (UPC).⁵⁵ Under the UPC, a decedent's surviving spouse takes the entire estate if no parent of the decedent survives and all of the decedent's surviving descendants are also descendants of the surviving spouse.⁵⁶ A surviving spouse receives a reduced portion of the estate if a parent of the decedent survives,⁵⁷ the surviving spouse has surviving descendants who are not descendants of the decedent,⁵⁸ or the decedent has surviving descendants from someone other than the surviving spouse.⁵⁹ If there is not a surviving spouse,

⁴⁷ See generally Lawrence M. Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 Wis. L. REV. 340 (describing the history of intestacy in the United States).

⁴⁸ See *id.* at 360-61.

⁴⁹ See WAGGONER ET AL., *supra* note 6, at 33.

⁵⁰ REPPY & TOMPKINS, *supra* note 24, at 81.

⁵¹ WAGGONER ET AL., *supra* note 6, at 33.

⁵² *Id.*

⁵³ Under American common law, the spouse took the entire estate if the decedent had no surviving issue or if the decedent's parents were dead. See *id.* at 37. If the decedent had both a surviving spouse and surviving issue, the spouse usually received one-third of the estate, and the children took the remaining two-thirds. See *id.* If the decedent had no surviving issue but was survived by a parent and spouse, the surviving spouse and parents usually split the estate, each receiving one-half. See *id.* at 38.

⁵⁴ See Friedman, *supra* note 47, at 376.

⁵⁵ See UNIF. PROBATE CODE (amended 1993), 8 U.L.A. (1998 & Supp. 1999).

⁵⁶ See *id.* § 2-102(1).

⁵⁷ See *id.* § 2-102(2).

⁵⁸ See *id.* § 2-102(3).

⁵⁹ See *id.* § 2-102(4).

the estate descends to the decedent's descendants.⁶⁰ If there are no surviving descendants, the decedent's parents share the estate.⁶¹ If there are no surviving descendants and neither parent is alive, descendants of the decedent's parents share the estate.⁶² If there are no surviving descendants in that line, descendants of the decedent's grandparents share the estate.⁶³ Finally, if no heirs can be found, the estate escheats to the state.⁶⁴

1. *General Policies of Probate Codes*

The law favors freedom of testation because it is "conducive to the achievement of certain socially desirable goals, such as the stimulation of economic activity,"⁶⁵ and it allows testators "to substitute for the rigid formulas of intestate succession a plan adapted to the special needs and the particular situation of each member of his family."⁶⁶ Thus, in creating default rules, probate codes attempt to best approximate how most testators dispose of their estate when dying with a valid will.⁶⁷ In other words, the function of probate courts and intestacy statutes is to "secure the disposition of property under administration as the owner, acting rationally, would have disposed of it if living."⁶⁸ The Uniform Probate Code explicitly articulates this objective as well.⁶⁹ The National Conference of Commissioners on Uniform State Laws initially developed the UPC to simplify and unify probate laws throughout the country.⁷⁰ A driving force behind the UPC is the goal of providing "suitable rules and procedures for the person of modest means who relies on the estate plan provided by law."⁷¹ To accomplish this goal, the UPC prescribes default rules using prevailing pat-

⁶⁰ See *id.* § 2-103(1).

⁶¹ See *id.* § 2-103(2).

⁶² See *id.* § 2-103(3).

⁶³ See *id.* § 2-103(4).

⁶⁴ See *id.* § 2-105.

⁶⁵ RHEINSTEIN & GLENDON, *supra* note 23, at 55.

⁶⁶ *Id.*

⁶⁷ See Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 929 (1992).

⁶⁸ REPPY & TOMPKINS, *supra* note 24, at 160.

⁶⁹ See UNIF. PROBATE CODE § 1-102(b)(2) (noting that a purpose of the UPC is "to discover and make effective the intent of a decedent in distribution of his property").

⁷⁰ See *id.* § 1-102(b)(1), (5) (noting that an "underlying purpose" of the UPC is to "simplify and clarify the law concerning the affairs of decedents" and to "make uniform the law among the various jurisdictions"). The inconsistency of probate laws from state to state is particularly troublesome given the mobile nature of the will-making portion of the American population. For example, an individual could make a will which was valid in the state of execution, but then move to another state following different probate requirements. This inconsistency results in litigation and wasted time. The UPC attempts to minimize this result. See *id.*

⁷¹ Fried, *supra* note 67, at 928-29 (quoting UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (1969)).

terms in valid wills as a guide.⁷² In addition, the UPC advocates liberal construction of its provisions to best "promote its underlying purposes and policies."⁷³

There are four major policies underlying intestacy laws in the United States; the most important of which is fulfilling the decedent's donative intent.⁷⁴ Generally, testators may dispose of their property in any manner they wish.⁷⁵ Because of this principle's importance in property law, it is natural to extend this principle to the disposition of property when no will exists, further reflecting society's commitment to donative freedom.⁷⁶

Another goal of intestacy laws is ensuring the fair distribution of property among family members.⁷⁷ Thus, probate codes seek to avoid creating dissatisfaction among family members in the disposition of an estate.⁷⁸ While striving to achieve this goal, intestate probate laws also try "to avoid complicating property ties and excessive subdivision of property."⁷⁹ This objective, however, is not as important as ensuring that the law reflects a decedent's donative intent.⁸⁰

A third objective of intestate laws is to promote societal interests, including "protect[ing] the financially dependent family."⁸¹ Most states have probate provisions ensuring spouses and minor children receive at least some of the decedent's estate.⁸² In providing for the

⁷² See *id.*

⁷³ UNIF. PROBATE CODE § 1-102(a).

⁷⁴ See RHEINSTEIN & GLENDON, *supra* note 23, at 24 (emphasizing that because the "legislature is in effect making a will for the deceased" probate codes "ought to coincide as far as possible with the probable wishes of the majority of people who die intestate").

⁷⁵ See Friedman, *supra* note 47, at 355 ("[T]he general rule is . . . that the testator . . . may make any disposition of his property he pleases."). There are a few exceptions to this general rule. For example, a forced share exists for a widow in her husband's estate to protect against disinheritance. In most states, a widow has the right to renounce her husband's will and instead take a share of the estate dictated by law. See *id.* at 360.

⁷⁶ See *id.* at 355. Friedman writes:

The intestacy laws can even be analyzed as an extension of the principle of free disposition of property at death. These laws can be looked upon as empirical recognition of the fact that most people choose close relatives as heirs; the man who dies without a will may be voluntarily adopting the statutory plan and saving himself trouble and legal fees.

Id. This Note will later argue that when an individual in a domestic partnership dies intestate, probate laws should recognize that the decedent would most likely wish the surviving partner to inherit at least part of the estate. See *infra* Parts III, IV.

⁷⁷ See Fellows et al., *supra* note 7, at 12.

⁷⁸ See *id.*

⁷⁹ Lomenzo, *supra* note 18, at 947 (quoting Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 324).

⁸⁰ See *id.* (noting that the focus in "the law of descent is on the property owner and not on the expectations of the surviving family members").

⁸¹ *Id.* (arguing that "protecting the financially dependent family . . . best serves society's interests" (footnote omitted)).

⁸² See Friedman, *supra* note 47, at 376-77.

distribution of property, intestacy statutes try to reflect changing norms in society.⁸³ Primogeniture, dower, and curtesy have given way to a probate system that includes not only the surviving spouse, but nonmarital and adopted children as well.⁸⁴

The fourth major objective of intestacy laws is "to promote and encourage the nuclear family."⁸⁵ Difficulty arises, however, in trying to define the term "family." Historically, society has valued the institution of the family—one consisting of a heterosexual, married couple and their biological children—for its legal, social, and religious significance.⁸⁶ In the past several decades, however, the configuration of the family has undergone a dramatic change.⁸⁷ Legal rights and obligations under intestacy laws, however, have remained unchanged.

2. *Donative Intent and the Changing Family*

As previously mentioned, although intestacy laws try to effectuate a decedent's donative intent, there are limits to this goal. For example, all probate codes protect surviving spouses.⁸⁸ Decedents cannot fully disinherit their surviving spouse.⁸⁹ This protection, however, is only afforded to those falling within the category of "surviving spouse."⁹⁰ Probate law does not recognize a surviving domestic partner as a surviving spouse for property distribution purposes.⁹¹ This exclusion means "the surviving partner [is treated] as no more a natural object of the decedent's bounty than a complete stranger."⁹²

The current system of property distribution is inflexible and outdated. Current intestacy laws do not take into account that the law

⁸³ See Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 707 (1993).

⁸⁴ See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 34-35 (1994).

⁸⁵ Lomenzo, *supra* note 18, at 947 (quoting Fellows et al., *supra* note 79, at 324).

⁸⁶ See *id.*

⁸⁷ See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1165 n.5 (1992); *supra* notes 2-8 and accompanying text.

⁸⁸ See Waggoner, *supra* note 84, at 61.

⁸⁹ See *id.* Probate laws guarantee a surviving spouse a portion of the decedent's estate, but the surviving spouse is the only family member who receives this type of protection. Surviving descendants, such as children, grandchildren, or surviving parents, can be disinherited. See WAGGONER ET AL., *supra* note 6, at 579 ("[C]hildren may be *intentionally* disinherited.").

⁹⁰ See Waggoner, *supra* note 84, at 23.

⁹¹ See David Margolick, *Single or Living Together, Having A Will Is Important*, N.Y. TIMES, Jan. 17, 1985, at C1 (arguing that in the absence of a will, "the state assumes that family members, not friends, are the natural objects of one's bounty," and thus a surviving partner is "at the mercy of the family, and it's up to them whether [the surviving partner] can keep what is really [his or her] own property when the decedent partner dies").

⁹² Waggoner, *supra* note 84, at 63.

deals with "particular individuals in particular circumstances."⁹³ Although acceptable a hundred years ago, it is not sufficient to presume that one's spouse or blood relations are the only natural objects of a decedent's bounty.⁹⁴ Domestic partnerships constitute a significant segment of the American family.⁹⁵ Therefore, intestacy laws should be revised to protect domestic partners' justifiable expectations.⁹⁶

Probate codes, including the UPC, have been slow to account for nontraditional families. The last major revisions to the UPC, made in 1990, tried to accommodate some of the changes in families by instituting provisions dealing with stepchildren and second marriages.⁹⁷ However, there are other variations of the traditional family that remain unrecognized.

3. *Summary of Policy*

Intestacy statutes attempt to ensure the "distribution of real and personal property that approximates what decedents would have done if they had made a will."⁹⁸ The National Conference designed the UPC to reflect the presumed donative intent of those who die intestate.⁹⁹ Ideally, individuals thus have the ability to not execute a will and still be assured that their accumulated wealth will pass to the intended takers.

The UPC and individual state probate codes, however, have not kept up with the changing times. Consequently, many individuals, especially those in domestic partnerships, must make a will if they wish to have their estate pass to their partner.¹⁰⁰

The next Part of this Note discusses legal recognition of domestic partnerships. While legal rights for domestic partners have increased

⁹³ *Id.*

⁹⁴ See ROBERT A. FARMER & ASSOC., *THE TRUTH ABOUT INHERITANCE* 7-8 (1968).

⁹⁵ See Fellows et al., *supra* note 7, at 3.

⁹⁶ See RHEINSTEIN & GLENDON, *supra* note 23, at 25 ("[O]ur present American intestacy laws are of venerable age, [and while they] have reflected the popular traditions of their time and place, . . . one may well wonder to what extent they express present American convictions."). One could argue that domestic partnerships do not need intestate protections because a partner could simply execute a will devising his or her property to a companion. Domestic partners, however, want and need intestacy protections for the same reasons married couples do: namely that many individuals "are reluctant to think about their mortality and procrastinate about remote contingencies. They fail to execute wills and powers of attorney, even though they are often aware of the unfortunate consequences of failing to act." Chambers, *supra* note 11, at 457.

⁹⁷ See generally Waggoner, *supra* note 2 (discussing the 1990 UPC revisions).

⁹⁸ King v. Riffe, 309 S.E.2d 85, 87-88 (W. Va. 1983).

⁹⁹ See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 640 (1988).

¹⁰⁰ See Lovas, *supra* note 2, at 363 ("Unless . . . voluntary protections have been created, the survivor of such an unmarried couple, homosexual or heterosexual, stands completely without inheritance rights.").

significantly in many areas of the law over the past decade,¹⁰¹ intestacy laws do not yet recognize domestic partners. With the growing recognition of nontraditional relationships, probate codes should be revised to ensure protection of domestic partners.

II

THE RIGHTS OF DOMESTIC PARTNERS

The number of claims by cohabitants who wish to protect their legal interests increases as the number of people living together outside the confines of marriage continues to rise.¹⁰² Courts are increasingly confronted with cases arising out of nonmarital relationships.¹⁰³ Eschewing a traditional, formalistic approach (i.e., simply asking whether or not a couple is legally married), courts have started to examine the characteristics of individual relationships.¹⁰⁴ In taking this approach, courts are attempting "to protect the reasonable expectations of the parties regarding their relationship."¹⁰⁵

A. Opposite-Sex Partners

Courts first recognized the legitimacy of claims of unmarried couples in suits involving the termination of a committed relationship.¹⁰⁶ In examining these types of cases, courts have tried to determine the mutual rights and obligations of the partners after the relationship dissolves.¹⁰⁷ Courts, however, have exhibited very little uniformity in examining domestic partners' rights. For example, some courts have allowed recovery under an implied contract theory.¹⁰⁸ Others have employed a quantum meruit theory, granting recovery based on the true value of the services one party performed during the relationship.¹⁰⁹

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987).

¹⁰⁴ See *Bowman & Cornish*, *supra* note 87, at 1169 (noting that "courts in most states have returned to a more functional approach in which they examine the characteristics of the particular relationship").

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ See, e.g., *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) (holding that an express agreement between two unmarried parties to live in a marriage-like relationship is not void as against public policy); *Watts*, 405 N.W.2d at 316 (holding that nonmarital cohabitators could use an unjust enrichment claim to recover after dissolution of the relationship); *Brooks v. Steffes* (*In re Estate of Steffes*), 290 N.W.2d 697, 708-09 (Wis. 1980) (holding an implied contract for repayment of services existed between a man and woman living together in an adulterous relationship).

¹⁰⁸ See, e.g., *Levar v. Elkins*, 604 P.2d 602, 604 (Alaska 1980); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978); *Watts*, 405 N.W.2d at 316.

¹⁰⁹ See, e.g., *Williams v. Mason*, 556 So. 2d 1045, 1051 (Miss. 1990).

*Marvin v. Marvin*¹¹⁰ was one of the first cases to examine the legal rights of persons in a domestic partnership. In *Marvin*, the plaintiff brought a breach-of-contract action against her former cohabitant, claiming the couple had entered into an oral agreement to "combine their efforts and earnings and . . . share equally any and all property accumulated as a result of their efforts whether individual or combined."¹¹¹ The court granted recovery, concluding that "the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed."¹¹² The California Supreme Court directly addressed the issue of nonmarital, domestic relationships in its opinion, stating that "[a]lthough we recognize the well-established public policy to foster and promote the institution of marriage, perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy."¹¹³

Other courts, however, have refused to enforce similar contracts between domestic partners, concluding that these contracts rest on illegal or immoral consideration.¹¹⁴ Still other jurisdictions have expressed a willingness to enforce property division agreements only if an express contract exists.¹¹⁵ At least one jurisdiction requires any such contracts to be in writing.¹¹⁶ Finally, no court has been willing to enforce a purported contract between domestic partners unless it is possible to sever sexual relations from the consideration of the contract.¹¹⁷

¹¹⁰ 557 P.2d 106 (Cal. 1976). *Marvin* received a great deal of publicity because the defendant was the famous movie actor, Lee Marvin. See Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 174 n.53 (1985).

¹¹¹ *Marvin*, 557 P.2d at 110.

¹¹² *Id.* at 122.

¹¹³ *Id.* at 122 (citations omitted).

¹¹⁴ See, e.g., *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78 (Cal. Ct. App. 1993) ("The agreement is unenforceable because the parties did not cohabit and therefore no consideration . . . existed severable from the sexual relationship."); *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977) (holding that cohabitation is an immoral consideration and thus incapable of supporting a contract); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324 (La. Ct. App. 1983).

¹¹⁵ See, e.g., *Alexander v. Alexander (In re Estate of Alexander)*, 445 So. 2d 836, 840 (Miss. 1984); *Kinkenon v. Hue*, 301 N.W.2d 77, 81 (Neb. 1981); *Dominguez v. Cruz*, 617 P.2d 1322, 1323 (N.M. Ct. App. 1980).

¹¹⁶ See MINN. STAT. ANN. § 513.075-.076 (West 1990).

¹¹⁷ See *Waggoner*, *supra* note 84, at 69 ("Because prostitution is illegal, a contract for prostitution is unenforceable.").

B. Same-Sex Couples

The judicial system has shown bias against individuals in same-sex, committed relationships, as compared to those in opposite-sex, committed relationships.¹¹⁸ Unlike opposite-sex couples, same-sex couples are legally prohibited from marrying and thus denied the many rights afforded to married couples.¹¹⁹

Like heterosexual, domestic couples, gay and lesbian partners do not have standing to sue in tort for wrongful death or other similar actions.¹²⁰ In addition, individuals in a same-sex domestic partnership cannot be the recipients of their partner's veterans' benefits or disability insurance.¹²¹ Also, the spousal communication evidence privilege does not extend to communications between same-sex couples.¹²² Finally, homosexual parents often face a presumption against the granting of custody or visitation rights,¹²³ as well as against the granting of decision making guardianship over incapacitated adults.¹²⁴

¹¹⁸ See Elaine Herscher, *10 Gay Couples to be Honored for Stability at S.F. Ceremony*, S.F. CHRON., Mar. 20, 1998, at A20 (describing how one gay couple, although together for thirty-three years, are "legal strangers, with no claims to inheritance, pensions or any other benefits automatically extended to heterosexual couples").

¹¹⁹ See ESKRIDGE, *supra* note 15, at 66. Eskridge lists a number of areas where a same-sex couple would benefit from legal recognition of its relationship. Although Eskridge focuses on same-sex couples, these issues affect all unmarried, committed couples. Included among these rights are: the right to receive support and alimony in the event of separation or divorce, preference in being appointed personal representative of an intestate decedent, priority in being appointed guardian of an incapacitated individual, the right to bring a lawsuit for wrongful death, the right to visit an incarcerated partner while incarcerated, and the right to survivor benefits on the death of a veteran partner. See *id.* at 66-67.

The reluctance to recognize same-sex couples may be due to a fear that recognizing homosexual relationships is a threat to family values. For "traditionalists, same-sex marriage is only one more threat to the values that made America great, which are rooted in [married] families with two parents, and in a whole battery of cultural institutions—among them churches and schools—that mutually reinforce each other." SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 11 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

¹²⁰ See *Raum v. Restaurant Assoc., Inc.*, 675 N.Y.S.2d 343, 344 (N.Y. App. Div. 1998) (holding that same-sex partner was not a spouse authorized to bring wrongful death action and that wrongful death statute, which did not allow such individuals to bring wrongful death action, did not discriminate against same-sex partners in spousal-type relationship because opposite-sex couples were also denied); see also *Elden v. Sheldon*, 758 P.2d 582, 588-90 (Cal. 1988) (holding that a surviving partner of a same-sex relationship could not recover damages for loss of consortium and negligent infliction of emotional distress).

¹²¹ See WAGGONER ET AL., *supra* note 6, at 87.

¹²² See ESKRIDGE, *supra* note 15, at 66; see also, e.g., CAL. EVID. CODE §§ 970, 980-87 (West 1999) (limiting privilege to married couples).

¹²³ See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (explaining that "while a lesbian mother is not per se an unfit parent," lesbianism is a consideration to be taken into account in determining the best interests of the child).

¹²⁴ See generally Brown, *supra* note 10 (detailing the development of law of medical proxy decision making and its effects on same-sex couples).

Despite the generally disparate treatment of same-sex couples, courts are increasingly recognizing same-sex relationships and extending to them rights usually preserved for the traditional family by taking a functional approach to the task of defining the concept of "family."¹²⁵ *Braschi v. Stahl Associates Co.*¹²⁶ is one of the most important cases using this approach to define family.¹²⁷ In *Braschi*, the court held that the surviving gay partner of a deceased tenant was part of the family of the decedent and thus entitled to protection under New York City rent and eviction regulations.¹²⁸ The court reasoned that consideration of the "emotional and financial commitment and interdependence" of the people involved achieved a more equitable definition of "family member."¹²⁹ Despite this decision, other courts have not adopted this broader definition of family.¹³⁰

Outside the judicial process, same-sex couples are increasingly achieving greater rights and recognition. In the private sector, many corporations and universities now extend employee benefits to domestic partners.¹³¹ Several cities have also recently granted some family benefits to the unmarried, committed partner of a public employee.¹³² Unlike the coverage afforded to an employee's spouse, however, these plans usually require committed, same-sex couples to prove a minimum duration, emotional commitment, intimacy, or shared financial responsibilities in order to be eligible for these bene-

¹²⁵ See generally Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) [hereinafter *Family Resemblance*] (looking at courts' application of a functional approach and ways to improve on this system).

¹²⁶ 543 N.E.2d 49 (N.Y. 1989).

¹²⁷ See *id.* 53-54 (expanding the meaning of "family" to reflect modern reality).

¹²⁸ See *id.* at 52-53.

¹²⁹ *Id.* at 54.

¹³⁰ See Melton, *supra* note 5, at 501-02; see also, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (refusing to expand definition of parent to include "categories of nonparents . . . who have had prior relationships with a child's parents" and denying child visitation rights to the same-sex ex-partner of the child's biological mother).

¹³¹ See William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1, 2-4 (1995) (discussing employment benefits for unmarried domestic partners).

¹³² Seattle, Madison (Wisconsin), Los Angeles, and San Francisco are just a few of the cities that have granted benefits of this kind. See Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 119, at 109. San Francisco has gone even further and passed a law requiring all companies to provide spousal benefits to unmarried partners, regardless of their sex, as a precondition of doing business with the city. See David W. Purcell, *Current Trends in Same-Sex Marriages*, in ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL, AND LEGAL ISSUES 37 (Robert P. Cabaj & David W. Purcell eds., 1998).

fits.¹³³ Thus, aspects of a relationship that are "assumed with respect to married couples must be proven by unmarried couples."¹³⁴

Although over five hundred companies and several states and municipalities extend some family benefits to the same-sex partner of an employee, the benefits extended are usually limited.¹³⁵ Usually, only health and insurance coverage benefits are included.¹³⁶ In some instances, the benefits may also extend to bereavement and family medical leave.¹³⁷ With respect to other rights, however, gays and lesbians "continue to be treated as legal strangers."¹³⁸

Claims arising upon death are not as common as claims occurring when the relationship ends during the lives of a couple.¹³⁹ Because most unmarried couples realize their situation is unique and mostly ignored by present laws, domestic couples often provide for each other in their wills.¹⁴⁰ In the few recent cases where a surviving partner has tried to receive a portion of the decedent partner's estate, the attempts have been unsuccessful.¹⁴¹ In *In re Estate of Cooper*,¹⁴² for example, a surviving partner tried to receive a larger share of his decedent partner's estate than the will granted through the elective share statute.¹⁴³ The court denied the claim, holding that a surviving homosexual partner had not been in a "spousal relationship" with the decedent and, therefore, was not entitled to a right of election against the decedent's will.¹⁴⁴

¹³³ See Vetter, *supra* note 131, at 4 (discussing the difficulty in distinguishing between domestic cohabitants who live the equivalent of a spousal relationship and those who live more like roommates).

¹³⁴ *Id.* at 13.

¹³⁵ See Purcell, *supra* note 132, at 35. IBM, Microsoft, Apple, Walt Disney, and the Democratic National Committee are examples of some of the companies that extend benefits to committed partners. See *id.* at 36-7.

¹³⁶ See *id.* at 35.

¹³⁷ See *id.* San Francisco's domestic partnership statute is among the most expansive in the nation and provides qualifying domestic partners with hospital visitation privileges, paid bereavement leave, and health plan coverage. See Cynthia Gorney, *Making It Official: The Law & Live-Ins; San Francisco Recognizes the Domestic Partner*, WASH. POST, July 5, 1989, at C1.

¹³⁸ Purcell, *supra* note 132, at 35.

¹³⁹ See Waggoner, *supra* note 84, at 63.

¹⁴⁰ See *id.*

¹⁴¹ See *In re Petri*, N.Y. L.J., Apr. 4, 1994, at 29 (N.Y. Sup. Ct. 1994) (holding that the surviving partner of an eleven-year, homosexual relationship was not a "surviving spouse" under successions laws and could not inherit through intestate succession); *In re Estate of Cooper*, 187 A.D.2d 128, 131-32, 135 (N.Y. App. Div. 1993) (holding surviving homosexual partner of decedent not entitled to right of election against partner's will because legislature defined "surviving spouse" as limited to husband or wife).

¹⁴² 187 A.D.2d 128 (N.Y. App. Div. 1993).

¹⁴³ See *id.* at 129.

¹⁴⁴ *Id.* at 130.

C. Summary of Rights

Current statutes largely ignore domestic partners' rights, thus court-made law almost exclusively governs these rights.¹⁴⁵ As unmarried but committed relationships have become increasingly common, the amount of court-made law recognizing domestic partners has grown.¹⁴⁶ Relying on the courts, however, does not always provide satisfactory answers for unmarried couples.¹⁴⁷ Court decisions are inconsistent and results may vary depending on the jurisdiction.¹⁴⁸ Some courts believe that issues relating to the rights of domestic partners are better left to the legislature.¹⁴⁹ Other courts base their refusal to recognize these domestic partner relationships on moral grounds.¹⁵⁰

Many commentators argue that individuals in committed relationships should guarantee their relational and testamentary rights through contracts, wills, and will substitutes.¹⁵¹ Judicial recognition of agreements concerning committed partners, however, is as unstable as judicial recognition of the relationship itself.¹⁵² Often, when an individual provides for a partner in a will, the decedent's family members contest the will.¹⁵³ In these cases, courts have most frequently found in favor of the biological family, concluding that dispositions of one's estate to someone other than one's natural bounty are suspect.¹⁵⁴ Thus, "[a]lthough persons in committed relationships can [try to] protect their respective interests . . . through private agreements, the protections fall short of the predictability and enforceability provided to persons who are married."¹⁵⁵

¹⁴⁵ See Bowman & Cornish, *supra* note 87, at 1168.

¹⁴⁶ See *id.*

¹⁴⁷ See Prince, *supra* note 110, at 167-68.

¹⁴⁸ See *id.*

¹⁴⁹ See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209-1211 (Ill. 1979) (noting that the issue of substituting private arrangement for marriage is a question best left to the legislative branch).

¹⁵⁰ See *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) ("Unmarried cohabitants receive no similar solicitous statutory protection, nor should they; such would impede the state's substantial interest in promoting and protecting marriage.")

¹⁵¹ See, e.g., Fellows et al., *supra* note 7, at 18; Melton, *supra* note 5, at 508.

¹⁵² See Prince, *supra* note 110, at 167-68.

¹⁵³ See *id.*

¹⁵⁴ See Bowman & Cornish, *supra* note 87, at 1168.

¹⁵⁵ Fellows et al., *supra* note 7, at 18.

III THE PUBLIC POLICY VIEWPOINT

People choose not to get married for many reasons.¹⁵⁶ Some choose not to marry because of philosophical beliefs.¹⁵⁷ Others do not marry for economic reasons.¹⁵⁸ There are still others, namely gay and lesbian couples, who may want to marry, but lack the legal right to do so.¹⁵⁹

Opponents of intestacy rights for unmarried couples often advance moral reasons for their view. First, some people believe that same-sex relationships are "immoral or pathological or . . . contribute to the crumbling of the 'traditional' family,"¹⁶⁰ and therefore courts should not recognize them in any manner. Many of these people also feel that heterosexual, nonmarital couples should not cohabitate.¹⁶¹ Thus, any attempt to extend to unmarried couples the same rights that married couples enjoy will face opposition from those who do not want to recognize such nontraditional relationships.

A. Arguments Based on Probate Code Policies

Those opposing the extension of inheritance rights to unmarried couples focus on intestacy's policy of encouraging the family.¹⁶² As stated earlier, the definition of family thus becomes a key issue. Although unmarried but committed couples do not fit into traditional notions¹⁶³ of family, they can function in a similar manner.

The Supreme Court has already recognized the benefits of a flexible definition of family.¹⁶⁴ Scholars characterize this broader ap-

¹⁵⁶ Marriage provides many benefits, but also creates many obligations on the participants. Some of these obligations include sexual fidelity, spousal support, alimony in the event of separation or divorce, and the marriage penalty in paying federal and local taxes. See ESKRIDGE, *supra* note 15, at 70. Eskridge argues that these obligations impose costs which, for some individuals, outweigh the benefits of marriage. See *id.* He also argues that permitting marriage for lesbian and gay couples would impose an extra cost—the publicity of having the marriage be part of the public record. See *id.* at 71.

¹⁵⁷ See Bowman & Cornish, *supra* note 87, at 1165.

¹⁵⁸ See *id.* at 1166. Couples with two incomes may end up in a higher tax bracket than they would if filing separately. See *id.* at 1166 & n.7.

¹⁵⁹ See *supra* Part II.B.

¹⁶⁰ Chambers, *supra* note 11, at 486.

¹⁶¹ See Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 202 (1989).

¹⁶² See Melton, *supra* note 5, at 507.

¹⁶³ The traditional family usually "refers to people who are related by blood, marriage, or adoption." Bowman & Cornish, *supra* note 87, at 1164 n.1.

¹⁶⁴ See *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."). This case supports an expansive view of family and the effort to define familial relationships in functional terms. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110,

proach as a functionalist view.¹⁶⁵ As one commentator explained, "[i]nstead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs."¹⁶⁶ A functional definition of family is more inclusive and adaptable to individual situations than the traditional definition. A functional definition recognizes that many people in emotionally and financially dependent, intimate relationships do not, or cannot, for a variety of reasons, marry the person they love. Several Supreme Court and lower court decisions suggest a trend toward this functional definition of the family.¹⁶⁷ This trend supports the position that the probate code should similarly apply a functional definition of family. Finally, ever since Professor John H. Langbein's rallying cry of "down with formalism," reform of the UPC has included a more functional view of family.¹⁶⁸

Therefore, even though drafters of intestacy laws may wish to promote the traditional notion of family, these drafters must recognize that many groups in today's world do not fall within the formal definition of family, yet function as such. Because many of these groups act as families, they should not be denied the benefits that probate codes extend to traditional families. Arguing that probate codes should only protect the traditional definition of family advances an outdated view of family¹⁶⁹ and fails to account for the growing acceptance and proliferation of nontraditional families.¹⁷⁰

Sustaining a narrow view of family runs counter to another main objective of probate codes—effectuating the decedent's donative intent.¹⁷¹ If the law refuses to recognize committed, nonmarital relationships, some decedents will never have their donative intentions

123-32 (1989) (plurality opinion) (suggesting that although most familial relationships that give rise to protected liberty interests are traditional, marital families, unmarried parents and their children may be included in the definition of family, and suggesting that the definition may expand even further).

¹⁶⁵ See *Family Resemblance*, *supra* note 125, at 1640-41; Melton, *supra* note 5, at 501.

¹⁶⁶ *Family Resemblance*, *supra* note 125, at 1646.

¹⁶⁷ See, e.g., *Michael H.*, 491 U.S. at 123-32; *Moore*, 431 U.S. at 504; *Brokenbaugh v. New Jersey Mfrs. Ins. Co.*, 386 A.2d 433, 437 (N.J. Super. Ct. App. Div. 1978); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

¹⁶⁸ Bruce H. Mann, Essay, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1033 (1994). Langbein was a driving force behind recent probate revisions. See *id.*

¹⁶⁹ See RHEINSTEIN & GLENDON, *supra* note 23, at 24-25 ("[M]ost of our present American intestacy laws are of venerable age or, even when of recent date, are no more than reenactments of older rules.").

¹⁷⁰ See *id.*

¹⁷¹ See *supra* notes 74-76 and accompanying text.

protected.¹⁷² As one commentator noted, “[h]undreds of court opinions repeat the stockphrase ‘the donor’s intention is the polestar of construction,’” but the law gives limited deference to a donor’s intent.¹⁷³ By withholding intestacy law protection from nontraditional families, individuals living outside the confines of marriage are denied respect for their donative intent.¹⁷⁴ Present intestacy statutes ignore the “considerable concern to regulate the devolution of property consistently with the [decedent’s] natural but unexpressed desires.”¹⁷⁵

Extending intestacy laws to cover domestic partnerships advances yet another policy behind intestacy laws—protecting the financially dependent family.¹⁷⁶ Under current law, the earnings of an unmarried person and the resources bought with those earnings are entirely the property of the earner, regardless of any domestic partnership in which such person might be engaged.¹⁷⁷ This rule, however, fails to recognize the reality of many domestic partnerships. Frequently, individuals in committed relationships pool their income and share expenses and rent, or even jointly buy property, even if title is only in one of the partners’ names.¹⁷⁸ Expanding the definition of family to include committed, domestic partners would recognize that many unmarried, committed couples involved in marriage-like relationships share financial burdens with each other. The most equitable approach is to ensure that a surviving partner receives a portion of the estate to which he or she has contributed.

As is the case in many marriages, in many domestic partnerships one partner is the primary or sole breadwinner.¹⁷⁹ Thus, the other partner relies upon the first partner’s income.¹⁸⁰ Because the law limits a surviving partner’s ability to inherit to situations in which a valid and enforceable will exists, an individual whose partner dies intestate may be left without any means of financial support. Current probate law treats surviving members of unmarried couples “as having contributed nothing to the decedent’s wealth.”¹⁸¹ Current law ignores not

¹⁷² Cf. Fellows et al., *supra* note 7, at 8 (arguing that intestacy statutes not only reflect social norms and values, but also shape them by recognizing and legitimizing relationships).

¹⁷³ Waggoner, *supra* note 84, at 23.

¹⁷⁴ See Fellows et al., *supra* note 7, at 23 (“A proposal for including a committed partner as an heir can be defended politically as facilitating individual donative freedom and as being remedial in nature.”).

¹⁷⁵ RHEINSTEIN & GLENDON, *supra* note 23, at 24.

¹⁷⁶ See *supra* notes 81-84 and accompanying text.

¹⁷⁷ See Waggoner, *supra* note 84, at 62.

¹⁷⁸ See, e.g., Whorton v. Dillingham, 248 Cal. Rptr. 405, 406-07 (Cal. Ct. App. 1988).

¹⁷⁹ See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1841 (1987); Waggoner, *supra* note 84, at 67.

¹⁸⁰ See Fellows et al., *supra* note 7, at 57.

¹⁸¹ Waggoner, *supra* note 84, at 63.

only financial contributions, but a surviving partner's time, support and sacrifices as well.¹⁸²

As previously noted, the last objective of intestacy law is ensuring a fair pattern of distribution.¹⁸³ Granting intestacy rights to surviving partners will not disrupt this goal. Arguably, courts and legislators should define the concept of "fair distribution" with reference to reliance interests.¹⁸⁴ In committed, domestic partnerships, like in marriages, the surviving partner is the party most likely to rely on receiving a portion of the decedent's estate.

B. Arguments Based on Public Attitudes and Actions

Pursuit of the policies behind intestacy statutes compels the extension of inheritance rights to surviving, committed partners. Furthering these objectives, however, is not the only reason that inheritance rights should be offered to those in domestic partnerships. Intestacy laws are a reflection of public attitudes.¹⁸⁵ The Uniform Probate Code and state probate codes have tried to draft their provisions based on public beliefs and actions.¹⁸⁶ In determining who should inherit and how much they should inherit, the UPC looks to valid, previous wills as a guide.¹⁸⁷

Most partners in committed relationships leave the majority of their estate to their surviving partner.¹⁸⁸ Another indication that most domestic partners wish to have their surviving partner inherit at least part of their estate is that many individuals name their partner as the beneficiary of an insurance policy.¹⁸⁹ A 1996 phone survey conducted by the Minnesota Center for Survey Research also supports this view.¹⁹⁰ The survey assessed public attitudes concerning the intestacy rights of surviving partners.¹⁹¹ The survey found that a majority of the public wanted a surviving partner to be able to inherit from an intes-

182 See *id.*

183 See *supra* notes 77-80 and accompanying text.

184 See Fellows et al., *supra* note 7, at 12.

185 See *id.* at 11.

186 See *id.*

187 See *id.* at 11-12.

188 See Margolick, *supra* note 91, at C1.

189 See *id.*

190 See Fellows et al., *supra* note 7, at 31-51. The survey was conducted to determine "attitudes about the inheritance rights for couples who are living together without being married." *Id.* at 31. The survey found that a "substantial majority" of those interviewed thought a partner should receive at least some of a decedent partner's estate. *Id.* at 38. The survey presented several scenarios to the interviewees. In some, the decedent partner was survived by both their partner and descendants; in others, the decedent partner was survived by their partner and by their parents; and in still others, the decedent was survived by just their partner. In all of the scenarios the respondents said the surviving partner should inherit at least half of the estate. See *id.*

191 See *id.* at 31.

tate partner.¹⁹² The results of this survey demonstrate society's changing definition of family. Thus, allowing surviving partners to inherit intestate would not only reflect the probable donative intent of individuals in domestic partnership relationships, but also coincide with public opinion.

While many married couples do not draft wills, they still know that their spouses will be protected by the law. Extending inheritance rights would give committed couples the same security as married couples. Domestic partners would thus have the option of either making a will or dying intestate, in either case being "assure[d] that accumulated wealth [would] pass[] to their intended takers."¹⁹³ This approach would also end the courts' need to develop legal fictions to fulfill the equitable demands of domestic partnership relations.¹⁹⁴ Through these legal maneuvers, courts have attributed the responsibilities and benefits of marriage to nonmarital relationships.¹⁹⁵ If legislatures extended intestacy laws to cover domestic partnerships, courts could then justifiably consider a surviving partner to be the natural object of a decedent's bounty without the added confusion and complexity of judicial fictions.

The "denial of legal rights to [unmarried but committed] couples is a wrong committed by society."¹⁹⁶ Denying unmarried, committed couples rights under intestacy laws imposes a great financial burden on these couples that married couples do not incur.¹⁹⁷ Documents such as wills and contracts are expensive,¹⁹⁸ difficult to prepare,¹⁹⁹ and do not "create the same level of protection, no matter how thoroughly prepared."²⁰⁰ Because intestacy laws do not recognize unmar-

192 See *id.* at 38.

193 *Id.* at 12.

194 See *supra* notes 102-13 and accompanying text.

195 See Bowman & Cornish, *supra* note 87, at 1168.

196 Melton, *supra* note 5, at 499.

197 See THE GOVERNOR'S COMM'N ON RIGHTS AND RESPONSIBILITIES OF SAME-SEX RELATIONSHIPS REPORT, FINDINGS AND RECOMMENDATIONS II-4 (1998) [hereinafter COLORADO REPORT]. Committed couples "don't have automatic access to [certain] benefits." *Id.* As one homosexual man testified at a Denver Public Hearing: "We have to research. We have to pay lawyers. We have to pay clerks. We have to cobble together an inefficient and sometimes inadequate legal structure to mimic the comprehensive and polished system that's available to married people." *Id.* (statement of Robert Janowski, M.D.).

198 A 1995 Hawaii Commission found that it cost at least \$6800 to make a will or enforceable contract dividing resources. This number is probably a low estimate for complex financial relationships. See COMM'N ON SEXUAL ORIENTATION AND LAW, STATE OF HAWAII REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW 1 (III) (1995) [hereinafter HAWAII REPORT].

199 See COLORADO REPORT, *supra* note 197, at II-4 (statement of Robert Janowski, M.D.).

200 *Id.* at II-5. As one participant, M.J. Lowe, stated at the hearings: [R]epresentatives say there are legal documents . . . [committed couples] can get to make up for the lack of [a legal] relationship. . . . [But] [s]electing and drafting the correct version of documents requires the serv-

ried couples, these couples cannot count on enforcement of contracts they make because the provisions of intestacy statutes often affect the interpretation of wills and trusts.²⁰¹ Thus, unequivocally granting intestacy rights to unmarried, committed couples should also reduce the number of will contests.

Most of those who oppose extending rights to domestic partners, base their arguments on religious conviction.²⁰² Some opponents believe that "there is no benefit to the state from a homosexual union" and that the state must protect the tradition of marriage between two individuals of the opposite sex.²⁰³ These arguments are based on fear that extending rights to unmarried couples will undermine the institution of marriage and "contribute to the moral decay of society."²⁰⁴ Therefore, according to this view, the state should not give committed couples the same rights as married couples.

In drafting legislation, however, a state must separate religion and government.²⁰⁵ In addition, extending intestacy rights does not interfere with religious rights, the institution of marriage, or affirm "the morality [and] the rightness of homosexual relationships."²⁰⁶ It merely allows a distinct but significant section of society to have its donative intent fulfilled without incurring outrageous costs.

Because same-sex partners do not even have the option of marriage, it is unfair to punish these couples by denying them statutory recognition of their donative intent. Same-sex domestic partners should not be punished merely because the legal system has not kept up with their growing numbers and increased acceptance by society. In addition, many same-sex partners are estranged from their families because of their lifestyle. This is "doubly unfortunate" for these couples since, in the absence of a will, those most likely to inherit are estranged parents or siblings.²⁰⁷

Simply because a couple finds marriage inappropriate or unavailable, the law should not limit or deny protection, recognition, or validation of their relationship. This statement is especially true in the realm of inheritance rights. Extending intestacy laws will not neces-

ices of an attorney, can cost quite a bit of money, and [there is] no guarantee that they will be honored in a time of crisis.

Id. at II-4 (statement of M.J. Lowe).

²⁰¹ See Lomenzo, *supra* note 18, at 947.

²⁰² See COLORADO REPORT, *supra* note 197, at II-8.

²⁰³ *Id.* at II-9.

²⁰⁴ *Id.* at II-10.

²⁰⁵ See *id.* at II-13 (concluding that with respect to same-sex marriages, "the policy of separation of church and state should be followed strictly").

²⁰⁶ *Id.* at II-8.

²⁰⁷ Chambers, *supra* note 11, at 457-58.

sarily affect other rights of unmarried couples,²⁰⁸ but will instead simply respect a decedent's wishes, thereby further satisfying the main objectives of intestacy laws. Providing committed couples with intestacy rights would not only satisfy a decedent partner's probable donative intent, but also reflect the general public's view as well.

C. Argument Based on the Ability to Define Committed Partners

Another major argument against extending intestacy rights to committed partners is that it is exceedingly difficult to define who qualifies as a committed partner.²⁰⁹ This argument, however, lacks merit. Many companies and cities already define these relationships for the purpose of employee benefits, insurance, and other similar programs.²¹⁰

The main difficulty in defining domestic partnerships is limiting both overinclusion and underinclusion. For example, it is necessary to distinguish roommates from those in committed relationships. Another important factor to consider is the duration of the relationship; an individual might live with another for a period of time, but not necessarily want that person to inherit his or her estate.²¹¹ Difficulty arises in determining how long is long enough in defining a committed relationship.

There are several alternatives to a case-by-case judicial determination of who is in a committed relationship.²¹² For example, legislatures could institute a registration system requiring committed couples to fulfill certain procedural steps and meet specific eligibility requirements in order to obtain rights given to committed couples. This self-identification process would eliminate any threat of overinclusion. An alternative approach would be to establish by statute specific factors for courts to examine in evaluating whether a couple is sufficiently committed. This Note will analyze these approaches in the next Part.

²⁰⁸ For example, granting unmarried couples an intestacy right does not mean that the ability to get married, sue for loss of consortium, or exercise immunity under evidence laws will automatically follow. Each law has different policies and can be amended on an individual basis.

²⁰⁹ See Melton, *supra* note 5, at 576.

²¹⁰ See COLORADO REPORT, *supra* note 197, at II-3.

²¹¹ See *Family Resemblance*, *supra* note 125, at 1646.

²¹² Cf. WAGGONER ET AL., *supra* note 6, at 104 (discussing the State of New York's factors for defining "family" under its eviction protection laws).

D. Summary

Individuals in domestic partnerships can try to protect their interests through private agreements, wills, and will substitutes.²¹³ Private ordering, however, cannot provide the same protection married couples enjoy.²¹⁴ Case law concerning the rights of domestic partners is so varied that, as one commentator noted, "one might expect that public policy has proven itself to romp in an unbridled manner, with judges in different places and at different times reaching very different conclusions about morals and the public good and refusing to enforce contracts on that basis."²¹⁵

Presently, committed couples need to pay for an attorney to draft a will or agreement to protect their partner's inheritance rights. Even then, domestic partners have no guarantee that a court will uphold these expensive agreements.²¹⁶ Thus, the present system harms nonmarital couples in a number of ways: First, many domestic partners may not be able to afford the expensive procedures required to guarantee their rights; second, even if domestic partners can afford to hire an attorney, there is no guarantee their wishes will be recognized. Finally, contracts are only useful once conflict arises.

Recognizing domestic partnerships in intestacy law not only eliminates the costs imposed on committed couples, but also guarantees a measure of respect for donative intent. In addition, the proposed approach ensures that sufficiently committed though unmarried couples benefit from the same laws that benefit married couples.

IV

ATTEMPTS AT FULFILLING INTESTATE POLICIES

A. Existing Law

Most current probate codes are designed to protect the traditional family,²¹⁷ and thus informal relationships are rarely recognized. Unmarried, heterosexual couples were historically protected through common-law marriage provisions.²¹⁸ However, most states have now abolished common-law marriages²¹⁹ because these informal associa-

²¹³ See Fellows et al., *supra* note 7, at 18; Prince, *supra* note 110, at 167.

²¹⁴ See Fellows et al., *supra* note 7, at 18 (noting that private agreements "fall short of the predictability and enforceability provided to persons who are married").

²¹⁵ Prince, *supra* note 110, at 169.

²¹⁶ See *id.* at 164-66.

²¹⁷ See Lovas, *supra* note 2, at 353-54.

²¹⁸ See Bowman & Cornish, *supra* note 87, at 1169.

²¹⁹ Only eleven states and the District of Columbia still recognize common-law marriage. These states are Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. See WAGGONER ET AL., *supra* note 6, at 84. New Hampshire has a statutory version of common-law marriage that is applicable only on death. See N.H. REV. STAT. ANN. § 457:39 (1992).

tions were vulnerable to fraud.²²⁰ In states where common-law marriage still exists, sufficiently committed, heterosexual couples receive the same intestacy protection as married couples.²²¹ Common-law marriage states, however, rarely extend rights to same-sex couples,²²² thereby ignoring a large number of domestic partnerships.

As society's standards have evolved over the past several decades, nonmarital relationships that parallel marriage relationships have greatly increased. As the number of such relationships has grown, courts have increasingly begun to appreciate the need for some kind of legal recognition of such relationships. Various courts have taken a variety of approaches in dealing with domestic partnerships. For example, one court has employed a quantum meruit theory in granting a surviving domestic partner a share of a decedent's estate.²²³ Another court has, with respect to same-sex couples, expanded the definition of family to include a surviving partner within the protection of state rent-control and eviction laws.²²⁴ One state supreme court found that a prohibition on same-sex marriages violated the state constitution.²²⁵ Still other courts, although not directly extending additional rights to same-sex domestic partners, have expressed serious doubts about whether marriage should be limited to opposite-sex couples.²²⁶ As one commentator opined, this view can be interpreted as a call to state legislatures to amend state statutes to ensure sufficient marital and inheritance rights for committed, same-sex couples.²²⁷ These various acts and views of the judiciary should be collectively interpreted as attempting to extend domestic partners more and more rights within our legal system. State legislatures should take note of this judicial activity and seek to amend current intestacy laws to better reflect the dynamics of today's society.

²²⁰ See Kandoian, *supra* note 179, at 1851.

²²¹ See *id.* at 1830-31.

²²² See, e.g., *De Santo v. Barnsley*, 476 A.2d 952, 953-56 (Pa. Super. Ct. 1984) (holding that same-sex individuals cannot create a common-law marriage contractually); *Slayton v. State*, 633 S.W.2d 934 (Tex. Ct. App. 1982) (noting that it is impossible for a same-sex couple to marry "with or without the formalities of law").

²²³ See *Williams v. Mason*, 556 So. 2d 1045, 1048-51 (Miss. 1990) (concluding that although the surviving partner could not enforce oral contract with decedent because of the statute of frauds, the partner was entitled to receive the reasonable value of services rendered to the decedent).

²²⁴ See *Braschi v. Stahl Assocs., Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (concluding that "a more realistic, and certainly equally valid, view of the family includes two adult lifetime partners whose relationship is long term").

²²⁵ See *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993).

²²⁶ See *In re Petri*, N.Y. L.J., Apr. 4, 1994, at 29 (N.Y. Sup. Ct. 1994) (noting that "[i]t is questionable whether, in this era of domestic partnerships and alternative lifestyle education in grammar schools, it can still be said that marriage has one universal meaning which does not include couples of the same sex").

²²⁷ See Daniel Wise, *Inheritance Barred to Gay Without a Will; Judge: Partner's Rights Tied to Marriage License*, N.Y. L.J., Feb. 4, 1995, at 1.

Although there is some agreement that nonmarital relationships should receive greater recognition, especially in the realm of intestacy statutes,²²⁸ there is no single solution to the problems facing nontraditional families. One of the major obstacles legislatures face in extending intestacy rights to domestic partners is deciding exactly how to define these relationships. In addition, because nontraditional families exist in so many variations, no statutory provision will be perfect. Nevertheless, legislatures should attempt to address these issues. There have already been a number of attempts, both at the local level and nationally (by a proposed amendment to the UPC), to extend intestacy rights to domestic partners.²²⁹ The remainder of this Note examines possible ways to extend intestacy rights to benefit committed partners.

B. Attempts at Statutory Revision

One way to extend inheritance rights to committed couples is to revise current statutes. For example, probate codes could simply be amended to statutorily include committed partners in existing inheritance laws. Another approach would be to draft entirely new laws applicable only to unmarried couples. This second approach would allow drafters to give committed couples and married couples different rights concerning the portion of the estate one can inherit from an intestate partner or spouse. In addition, drafters would have discretion to decide whether other rights, such as elective shares, should be extended to committed couples.

Probate code provisions are influenced by tradition and history.²³⁰ Drafters, however, should try "not to perpetuate historical rules that [are] . . . inconsistent with modern attitudes."²³¹ Because probate codes are intended to reflect current societal sentiment and a decedent's probable donative intent,²³² probate codes should be amended to reflect today's society and give committed couples inheritance rights.²³³

Statutory revisions with respect to committed couples would not have to affect existing marriage laws.²³⁴ They could be sufficiently narrowly drafted to only grant a surviving partner the right to inherit

²²⁸ See Fellows et al., *supra* note 7, at 5-6.

²²⁹ See *infra* Part IV.B, C.

²³⁰ See Fellows et al., *supra* note 7, at 11.

²³¹ *Id.*

²³² See *supra* Part I.B.

²³³ See Fellows et al., *supra* note 7, at 11.

²³⁴ Drafters could write a separate statute which applied only to committed partners' right to inherit from their intestate partners. This kind of statute would not implicate eligibility and marriage formalities. See, e.g., WAGGONER ET AL., *supra* note 6, at 107 (setting out Waggoner's proposal).

from an intestate partner. This tactic would minimize criticism from those who want to protect traditional notions of family.

There has already been some attempts to amend current probate codes to include domestic partners. Professor Waggoner proposed to the Joint Editorial Board of the Uniform Probate Code a statute allowing unmarried individuals to inherit from a deceased partner.²³⁵ This proposal has generated much discussion and influenced states

²³⁵ Waggoner's proposed amendment, entitled "Intestate Share of Committed Partner," reads:

(a) [*Amount.*] If an unmarried, adult decedent dies without a valid will and leaves a surviving committed partner, the decedent's surviving committed partner is entitled to:

(1) the first [\$50,000], plus one-half of any balance of the intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving committed partner and there is no other descendant of the surviving committed partner who survives the decedent;

(2) one-half of the intestate estate, in cases not covered by paragraph (1).

(b) [*Committed Partner, Requirements.*] To be the decedent's committed partner, the individual must, at the decedent's death: (i) have been an unmarried adult; (ii) not have been prohibited from marrying the decedent under the law of this state by reason of a blood relationship of the decedent; and (iii) have been sharing a common household with the decedent in a marriage-like relationship. Only one individual can qualify as the decedent's committed partner for purposes of this section.

(c) [*Common Household.*] For purposes of subsections (b) and (e), "sharing a common household" . . . means that the decedent and the individual shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's death

(d) [*Marriage-like Relationship; Factors.*] For purposes of subsection (b), a "marriage like relationship" is a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring. Although no single factor or set of factors determines whether a relationship qualifies as marriage-like, the following factors are among those to be considered:

(1) the purpose, duration, constancy, and degree of exclusivity of the relationship;

(2) the degree to which the parties intermingled finances

(3) the degree to which the parties formalized legal obligations, intentions and responsibilities to one another, such as by one or both naming the other as primary beneficiary of life insurance or employee benefit plans or as agent to make health care decisions;

(4) whether the couple shared in co-parenting a child and the degree of joint care and support given the child;

(5) whether the couple joined in a marriage or a commitment ceremony, even if the ceremony was not of a type giving rise to a presumption under subsection (e) (3); and

(6) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

and cities to consider extending intestacy rights to committed couples.²³⁶ Although the Joint Editorial Board recently dropped the proposal,²³⁷ Waggoner's proposal has opened the debate on extending intestacy rights and remains an excellent model for statutory revision.

Waggoner's proposal accomplishes two things: it determines both who is a surviving committed partner and what the intestacy share of those individuals should be.²³⁸ Waggoner suggests giving a surviving, committed partner a smaller share than what is given to a surviving spouse.²³⁹ Thus, Waggoner's proposal avoids looking like a common-law marriage intestacy statute.²⁴⁰ Waggoner recommends a smaller intestate portion for surviving, committed partners "in recognition of the competing claims of the decedent's blood or adoptive relatives, and to some extent to maintain the incentive to enter into formal marriage."²⁴¹

Waggoner's proposal sets forth four criteria for identifying committed partners.²⁴² First, the partners cannot be related by blood.²⁴³ Second, neither partner can be married at the decedent's death.²⁴⁴

(e) [*Presumption.*] An individual's relationship with the decedent is presumed to have been marriage-like if:

(1) during the [six] year period next preceding the decedent's death the decedent and the individual shared a common household for periods totaling at least [five] years;

(2) the decedent or the individual registered or designated the other as his [or her] domestic partner with and under procedures established by an organization and neither partner executed a document terminating or purporting to terminate the registration designation;

(3) the decedent and the individual joined in a marriage or commitment ceremony conducted and contemporaneously certified in writing by an organization; or

(4) the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent regarding a child, and if, in either case, the child lived before the age of 18 in the common household of the decedent and the individual.

(f) [*Force of the Presumption.*] If a presumption arises under subsection (e) because only one of the factors is established, the presumption is rebuttable by a preponderance of the evidence. If more than one of the listed factors is established, the presumption can only be rebutted by clear and convincing evidence.

Id.

²³⁶ See E-mail from Lawrence Waggoner, Professor of Law, University of Michigan, to Marissa Holob, *Cornell Law Review* (Jan. 20, 1999) (on file with author).

²³⁷ See E-mail from Lawrence Waggoner, Professor of Law, University of Michigan, to Marissa Holob, *Cornell Law Review* (Jan. 25, 1999) (on file with author). The proposal was dropped so that states could adopt individual solutions. See *id.*

²³⁸ See Fellows et al., *supra* note 7, at 24.

²³⁹ See *id.* at 25.

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² See WAGGONER ET AL., *supra* note 6, at 107, § (b)-(d).

²⁴³ See *id.* § (b).

²⁴⁴ See *id.*

Third, the partners must have "shared the same place to live, whether or not [they] had other places to live."²⁴⁵ Lastly, the two individuals must have had a "marriage-like" relationship.²⁴⁶ If these four criteria are met, a surviving partner will receive an intestate portion regardless of whether the couple ever signed any forms solemnizing their relationship. Thus, a surviving partner's inheritance rights will not be terminated merely because of a technicality.

The first three of Waggoner's criteria are objective. The fourth requirement, however, is subjective and will be effective in identifying truly committed couples. The proposal defines marriage-like relationship as two individuals who "share one another's lives in a long-term, intimate and committed relationship of mutual caring."²⁴⁷ In determining whether a relationship is marriage-like, Waggoner proposes several considerations, including the following: the length of the relationship, whether the two individuals share finances,²⁴⁸ and whether they participated in a commitment ceremony.²⁴⁹

Waggoner's proposal, although effective, fails to address certain significant issues. Foremost, unmarried couples remain unable to fully benefit from the laws that married couples do.²⁵⁰ If a surviving partner is satisfactorily identified as the natural object of a decedent's bounty, the surviving partner should take the same portion of the estate that a surviving spouse receives. The policies underlying probate codes would be best satisfied by allowing the decedent's full donative intent to be recognized.

By recognizing marriage-like relationships between same-sex individuals, Waggoner's proposal raises serious potential issues.²⁵¹ Those who resist expanding the definition of marriage may vehemently object to Waggoner's proposal, but may perhaps be more receptive to a registration system. Another potential problem is that because the criteria for determining a marriage-like relationship are subjective, litigation could ensue.²⁵² Finally, because there is no guarantee courts will use these criteria in the manner Waggoner envisions, nonmarital couples would still not have the same security as married couples.

Waggoner's proposal is, however, a significant step in the right direction. It substantiates the status of nonmarital relationships in modern society and thereby confers significant rights on domestic

²⁴⁵ *Id.* § (c).

²⁴⁶ *Id.* § (d).

²⁴⁷ *Id.*

²⁴⁸ *See id.* § (d)(1).

²⁴⁹ *See id.* § (d)(5).

²⁵⁰ *See* Fellows et al., *supra* note 7, at 26.

²⁵¹ *See id.* at 27.

²⁵² *See* Waggoner, *supra* note 84, at 83 (discussing the potential for litigation, but explaining how the proposal addresses this issue).

partners. Waggoner's proposal, at least one commentator has argued, "presents the best chance that a deserving individual will obtain heir status and that an undeserving individual will not."²⁵³

C. Another Approach: Reciprocal Benefits

Another way to extend inheritance rights to same-sex couples is through a "reciprocal benefits" method. The debate over reciprocal benefits began in the early 1990s when Hawaii came close to extending the right to marry to lesbian and gay couples.²⁵⁴ Permitting same-sex marriages would guarantee individuals in same-sex relationships the protections provided by the institution of marriage.²⁵⁵ Allowing same-sex marriages, however, would still not address the rights of those who decide not to marry.

Many states reacted negatively to Hawaii's proposal of permitting same-sex marriage.²⁵⁶ In response, Hawaii established a commission to examine the major legal and economic benefits of extending the right of marriage to same-sex couples.²⁵⁷ After many months of debate, the commission recommended extending "all the benefits [married couples have] to same-gender couples by allowing them to marry."²⁵⁸ As a result of the commission's report, but despite its specific recommendation, Hawaii's legislature passed the Reciprocal Benefits Act, a comprehensive domestic partnership rights law.²⁵⁹

Although domestic partnership laws fall short of granting full marital status, they do extend the rights and obligations of marriage to domestic partners without requiring marriage.²⁶⁰ To receive these

²⁵³ Fellows et al., *supra* note 7, at 28-29.

²⁵⁴ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (concluding that a state requirement that marriage be between a male and female "was subject to strict 'scrutiny'"); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996), *aff'd* 950 P.2d 1234 (Haw. 1997); Ellen Goodman, *The Marrying Kind*, TIMES-PICAYUNE, Jan. 5, 1999.

²⁵⁵ See HAWAII REPORT, *supra* note 198, at Summary.

²⁵⁶ See Goodman, *supra* note 254.

²⁵⁷ See HAWAII REPORT, *supra* note 198.

²⁵⁸ *Id.* at ch. III, § IV.

²⁵⁹ See HAW. REV. STAT. ANN. tit. 31, § 572C-1 to -7 (Michie 1999). New York City and Minneapolis also have registration for unmarried couples by local ordinances. NEW YORK CITY, N.Y., CODE tit. 51, § 4-01 (2000); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 142, § 142.30 (2000). In October 1999, when this Note was already being prepared for publication, California enacted a registration system for domestic partnerships. See Family Law-Domestic Partners-Rights and Obligations, 1999 Cal. Legis. Serv. ch. 588 (West) (codified in scattered sections of CAL. FAM. CODE, CAL. GOV'T CODE, and CAL. HEALTH & SAFETY CODE (West 2000)). While the California provision is beyond the scope of this Note, the reader should note that this provision preempts local registration ordinances, see *id.* § 2 (codified at CAL. FAM. CODE § 299.6 (West 2000)), and provides for termination proceedings, see *id.* § 2 (codified at CAL. FAM. CODE § 299 (West 2000)), but does not expressly alter intestacy rights.

²⁶⁰ Some of the rights extended to domestic partners under domestic partnership laws include: (1) a share of a decedent's estate equivalent to that of a surviving spouse, (2) a

benefits, a couple must declare its status as a domestic partnership.²⁶¹ In Hawaii, once domestic partners have filed their declarations, they are included in any definition or statutory use of the terms spouse, family, immediate family, or dependent.²⁶² In addition, the Family Court will exercise jurisdiction over domestic partnership dissolution cases in the same way it will over divorce cases.²⁶³

Hawaii's domestic partnership law only applies to parties "legally prohibited from marrying under Hawaii law,"²⁶⁴ and thus opposite-sex couples cannot benefit from the law. The requirements of Hawaii's domestic partnership law, however, are sufficiently broad so as to allow related individuals to qualify.²⁶⁵ This, unfortunately, "undermines the recognition of same-sex committed relationships as uniquely intimate, emotional attachments and therefore supports rather than disrupts subordination based on sexual orientation."²⁶⁶

Hawaii's domestic partnership law is limited in that it does not extend rights unless a couple signs the declaration.²⁶⁷ If a couple does not properly declare its relationship, they receive none of the rights extended by the law, including those relating to inheritance rights. Even if "there is substantial and convincing evidence that a committed relationship existed between the decedent and another person," a surviving partner has no intestacy rights if the relationship was not properly declared.²⁶⁸ As one commentator has noted, Hawaii's enactment of its Reciprocal Beneficiaries Act may mean that courts will be "less willing to recognize contractual and equitable claims of one same-sex partner against the other."²⁶⁹

D. Colorado's Attempt: Registration of Committed Partners

Other states have explored alternative ways of extending to domestic partners rights similar to those afforded married couples. For example, in September 1997, Colorado Governor Roy Romer appointed a commission "to explore whether or not the state should extend any rights, benefits, responsibilities, or obligations to commit-

homestead allowance, (3) exempt property protection, and (4) an elective share option. See HAW. REV. STAT. ANN. tit. 31, §§ 560:2-102, :2-402 to :2-404.

²⁶¹ The statute defines a "declaration of reciprocal beneficiary relationship" as "a statement in a form issued by the director [of health] that declares the intent of two people to enter into a relationship. By signing it, two people swear under penalty of perjury that they meet the requirements for a valid reciprocal beneficiary relationship." *Id.* §§ 572C-4 to -5.

²⁶² See *id.* § 572C-1.

²⁶³ See *id.* § 560:2-804.

²⁶⁴ Fellows et al., *supra* note 7, at 29.

²⁶⁵ See *id.* at 30 (HAW. REV. STAT. ANN. tit. 31, § 572C-2).

²⁶⁶ *Id.*

²⁶⁷ See *id.* at 29.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 29 n.146.

ted relationships between two members of the same sex.”²⁷⁰ This action followed the Governor’s veto of bills attempting to amend the State’s definition of marriage to ban same-sex marriages altogether.²⁷¹

Among the topics the commission focused on were property and inheritance rights. After several hearings and much study, the commission recommended extending same-sex couples rights and responsibilities coextensive with married couples.²⁷² In reaching this conclusion, the commission rejected “the assertion that persons in committed relationships are able to access the necessary rights and protections through existing legal means, such as wills and powers of attorney.”²⁷³

Wishing to avoid piecemeal legislation,²⁷⁴ the commission recommended a comprehensive solution. The commission recommended that the state “create a legal framework to recognize the establishment and registration of committed relationships.”²⁷⁵ The commission also recommended “that a single law be adopted . . . [making] reference to those laws extending rights, protections, obligations, and responsibilities to married couples and amend[ing] such laws by reference to apply also to registered committed partners.”²⁷⁶

Colorado’s progress on the commission’s recommendations has been limited. Governor Romer was denied reelection in 1998 and for the first time in over twenty years, Colorado has a Republican governor and Republican-controlled Senate.²⁷⁷ Because of this political changeover, Colorado has not implemented the commission’s recommendations.²⁷⁸ The Colorado legislature has acted on some aspects of the commission’s report, including introducing a bill defining committed relationships.²⁷⁹ In addition, the legislature has identified pro-

²⁷⁰ COLORADO REPORT, *supra* note 197, at I-1.

²⁷¹ *See id.* The Governor twice vetoed such bills passed by the state legislature, once in 1996 and again in 1997. *See id.*

²⁷² *See id.* at II-19.

²⁷³ *Id.* at II-17 (noting further that the “overwhelming evidence [indicated that] such arrangements cannot create the same level of protection for committed partners that is available to married couples”).

²⁷⁴ *See id.* at IV-3.

²⁷⁵ *Id.* at IV-2. The proposal defined committed relationship as one “between two people of the same-sex who affirm that they are not related by kinship, are of the legal age of consent and are not otherwise married or registered in another committed relationship.” *Id.* at IV-3.

²⁷⁶ *Id.*

²⁷⁷ *See* Michelle Dally Johnston, *Owen Sees ‘Exciting Times’ 40th Governor, First in GOP since 1975*, DENVER POST, Jan. 13, 1999, at A1.

²⁷⁸ *See* John Sanko, *Changes in the Offing Under Owens, Conservative Bent Sure to Provide Contrast to 24 Year Democratic Run*, ROCKY MOUNTAIN POST, Jan. 3, 1999, at 5A.

²⁷⁹ *See* A Bill for an Act Concerning Probate Procedures for Reciprocal Beneficiaries, S.B. 111, 62d Leg., 2d Reg. Sess. (Colo. 2000) (proposing amendments to *Colorado Revised Statutes* that would “authorize Reciprocal Beneficiaries to stand in the same position and inherit from their deceased partners in the same manner as a surviving spouse would in-

bate and inheritance law as the first area of law it wants to amend with respect to domestic partners.²⁸⁰

The Colorado commission's approach is very similar to Hawaii's reciprocal benefits method. Hawaii's plan, however, allows registered domestic partners to receive all of the benefits of married couples. As a result of Hawaii's domestic partnership law, any reference to spouse

herit from his or her deceased spouse"). The proposed bill defines a "RECIPROCAL BENEFICIARY" as a person who is a "COMMITTED PARTNER." *Id.* (proposing the addition of section 15-10-201 to *Colorado Revised Statutes*). A "COMMITTED PARTNER" is a party to a "COMMITTED PARTNERSHIP," which means "A PARTNERSHIP BETWEEN TWO PERSONS WHO HAVE DECLARED THEMSELVES AS COMMITTED PARTNERS, WHO HAVE FILED AN AFFIDAVIT OF COMMITTED PARTNERSHIP PURSUANT TO SECTION 13-23-103, AND [who meet certain criteria]." *Id.* (proposing the addition of section 13-23-102(1)-(2) to the *Colorado Revised Statutes*). Several criteria are then listed. First, both persons must be over eighteen years of age and neither may be married or a partner in another committed relationship. See *id.* (proposing the addition of section 13-23-102(2)(a)-(b) to the *Colorado Revised Statutes*). Second, the committed partners must not be permitted to marry each other under Colorado law. See *id.* (proposing the addition of section 13-23-102(2)(c) to the *Colorado Revised Statutes*). Third, the two persons cannot be related by blood in a way that would prevent them from marrying under Colorado law. See *id.* (proposing the addition of section 13-23-101(2)(d) to the *Colorado Revised Statutes*). Fourth, neither partner may have terminated the committed relationship pursuant to the proposed section 13-23-103. See *id.* (proposing the addition of section 13-23-102(2)(e) to the *Colorado Revised Statutes*). Finally, the bill provides that a "COMMITTED PARTNERSHIP" is established when the partners execute and file an "AFFIDAVIT OF COMMITTED PARTNERSHIP" with the county clerk and recorder attesting to the foregoing requirements. *Id.* (proposing the addition of section 13-23-103 to the *Colorado Revised Statutes*).

²⁸⁰ See *id.* The proposed bill would extend intestate succession to a "SURVIVING RECIPROCAL BENEFICIARY." *Id.* (proposing the amendment of section 15-11-102 of the *Colorado Revised Statutes*); see also *id.* (proposing the amendment of section 15-10-201 of the *Colorado Revised Statutes* (defining "RECIPROCAL BENEFICIARY" as a "COMMITTED PARTNER" meeting the proposed criteria of section 13-23-102)). The bill would revise section 15-11-102 of the *Colorado Revised Statutes*, renaming the section "Share of spouse or reciprocal beneficiary." See *id.* The bill proposes that the new section read:

The various possible circumstances describing the decedent, his or her surviving spouse, and HIS OR HER SURVIVING RECIPROCAL BENEFICIARY, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY. If more than one circumstance is applicable, the circumstances that produce the largest share for the surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY shall be applied.

(1) If:

- (a) No descendant or parent of the decedent survives the decedent, then the surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY receives the entire intestate estate; or
- (b) All of the descendant's surviving descendants are also descendants of the surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY and there are no other descendants of the surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY who survive the decedent, then the surviving spouse OR SURVIVING RECIPROCAL BENEFICIARY receives the entire intestate estate.

Id. (proposing the amendment of section 15-11-102(1)(a)-(b) of the *Colorado Revised Statutes*). The proposed bill continues, inserting "SURVIVING RECIPROCAL BENEFICIARY" wherever there is mention of a surviving spouse. *Id.*

or surviving spouse includes domestic partners.²⁸¹ The Colorado proposal is not as broad; even after a couple registers with the state they are not guaranteed the same rights as married couples. Unless the legislature also amends its laws to include the term "committed relationship" or "partner" wherever there is a reference to "spouse," registered partners will not receive the same benefits as married couples.²⁸² By not including registered partners in its definition of spouse, the Colorado legislature is not giving individuals in committed relationships as many rights as married couples. Instead, the legislature is picking and choosing the specific areas of law it feels should be extended to include domestic partners.

E. A More Comprehensive Approach

Although the proposals just examined show a commitment to granting nonmarital couples intestacy rights, they are one-sided, focusing on either homosexual couples or heterosexual domestic partners. Granting all surviving partners, whether homosexual or heterosexual, the right to inherit from a decedent partner would further the goals of intestate succession more than simply extending rights to one or the other of these two groups.

This Note proposes that legislatures adopt a more comprehensive approach, whereby all couples, whether same-sex or opposite-sex, have the option of either filing as domestic partners or marrying their partner. While this "choice approach" would evoke policy repercussions, it would also best effectuate the goals of intestacy law.

Under this "choice approach," the extent of couples' rights and obligations are contingent on whether they marry, register as a committed couple, or do nothing. This proposal would affect not only the rights of individuals under intestacy laws, but also how couples terminate their relationships. For example, under this approach, those who file as domestic partners may more readily terminate their relationship than couples who marry.

This proposal is based on a functional definition of family. It recognizes variations in family relationships, commitments, and obligations. It also acknowledges that not all couples wish to implicate the institution of marriage, yet they still want legal validation of their relationship. My approach would give couples options in defining their relationship and allow them to dictate more precisely their mutual rights and responsibilities under the law. In addition to marriage, committed couples could choose domestic partnership status, thus en-

²⁸¹ See HAW. REV. STAT. ANN. tit. 31, § 572C-1 (Michie 1999).

²⁸² See COLORADO REPORT, *supra* note 197, at IV-3.

sure legal recognition of their relationship without implicating all of the obligations of marriage.

Under both the filing system and marriage, partners and spouses would be able to recover under intestacy laws. However, a surviving partner would be entitled to a smaller percentage of an estate than a surviving spouse. Since all couples, whether same- or opposite-sex, would have the option of either marrying or registering, those couples choosing to register would be implicitly accepting the difference in inheritance portions. Thus, while the "choice approach" grants a surviving partner a smaller percentage than a surviving spouse, it establishes an intestate right where none existed before and appropriately reflects a couples' choice of partnership over marriage.

This approach would not eliminate all problems, however. Should a committed couple fail to sign a declaration, a surviving partner would not be able to seek judicial remedy from the intestacy laws. Conversely, a significant benefit of this system would be a decrease in litigation concerning which committed partners are entitled to intestacy rights; only registered domestic partners would have such rights. This proposal eliminates the risk of a committed relationship going unrecognized, as is possible in Waggoner's discretionary proposal. Finally, this "choice approach" eliminates the risk that family members of the decedent will attempt to undermine the surviving partner's right to inherit, because such rights would be guaranteed by law. In addition, because of the black-letter nature of this proposal, the views of individual judges would not affect who is defined as a committed partner.

This "choice approach" would also better recognize the variant forms of family now prevalent in our society. By giving all couples the option of both domestic partnership registration and marriage, this approach provides legal validation for all committed couples. Registered couples would be considered legal parallels of married couples, adding legitimacy to different forms of "family."

By greatly increasing the legal recognition of nonmarital relationships, the judicial enforcement of wills and will substitutes would also be effected. Courts would entertain fewer cases involving allegations of undue influence by a surviving partner since, assuming the relationship was registered, the surviving partner would be guaranteed a portion of the decedent's estate.

A final advantage of the "choice system" is that by legally guaranteeing the intestacy rights of married and registered partners, partners will not have to hire a lawyer to ensure the testamentary rights of their loved one.

CONCLUSION

The main goal of intestacy statutes is to further a decedent's likely donative intent. For individuals who, for whatever reason, fail to make a will, intestacy statutes are designed to ensure the decedent's family receives the estate. A functional definition of family best accomplishes this policy by recognizing emotional and intimate relationships that exist outside the traditional nuclear family. A functional definition of family likewise supports the right of surviving, committed partners, like surviving spouses, to inherit, even when the decedent partner fails to make a will. To best achieve the goal of reflecting a decedent's likely donative intent, current probate codes must be expanded to include sufficiently committed partners.

State legislatures should draft laws that "reflect the popular convictions as to the 'proper' distribution of a dead [person's] property."²⁸³ This Note has shown that current probate codes are outdated. While at one point they reflected the "popular traditions of their time and place,"²⁸⁴ these codes no longer "express present American convictions."²⁸⁵ The public supports extending intestacy provisions to include those in committed relationships. This Note examined several approaches to granting these rights, and while none is ideal, each furthers probate law objectives, especially the fulfillment of a decedent's donative intent. As one commentator eloquently stated "[w]here the non-traditional family is concerned, social evolution has outpaced legal evolution. The laws that protected the traditional family in the past no longer provide adequate protection for the justifiable expectations of today's non-traditional family members."²⁸⁶ Thus, in order to eliminate inconsistent and inadequate intestacy laws, legislatures should amend current probate codes to include unmarried, committed couples.

²⁸³ RHEINSTEIN & GLENDON, *supra* note 23, at 24.

²⁸⁴ *Id.* at 25.

²⁸⁵ *Id.*

²⁸⁶ Lovas, *supra* note 2, at 395.